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NOTES

The Newsworthiness Defense to the Public Disclosure Tort

BY GEOFF DENDY*

INTRODUCTION

The concept of an individual right to privacy originated in the 1890 *Harvard Law Review* article, authored by Samuel D. Warren and Louis D. Brandeis, entitled *The Right to Privacy*.¹ The authors characterized privacy as “the right to be let alone,”² and this article is regarded as perhaps the single most influential law review article to date.³ In the one hundred years since Warren and Brandeis penned their famous piece, thirty-six jurisdictions have acknowledged a common law right to privacy.⁴ Invasion of privacy is generally recognized to encompass four separate torts: unreasonable intrusion upon seclusion; appropriation of some aspect of a person’s personality for commercial use; public disclosure of private facts; and publicity which places a

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¹ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV L. REV 193 (1890).

The “first real application of this [tort] was in a Kentucky case.” WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 119, at 809 (4th ed. 1971) (citing *Brents v. Morgan*, 299 S.W. 867 (Ky. 1927)).

² Warren & Brandeis, *supra* note 1, at 193 (commenting that the law developed to afford individuals the right to be free from unsolicited media exposure).

³ William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 383 (1960).

⁴ Barbara Moretti, Note, *Outing: Justifiable or Unwarranted Invasion of Privacy? The Private Facts Tort as a Remedy For Disclosures of Sexual Orientation*, 11 CARDOZO ARTS & ENT. L.J. 857, 899 (1993).

person in a false light before the public.⁵ This Note, however, only addresses the public disclosure of private facts tort and its attendant defense,⁶ newsworthiness; and analyzes which formulation of the defense the Supreme Court is likely to accept if and when it considers the issue.

The public disclosure of private facts tort has received a great deal of critical commentary due to its inherent conflicts with the First Amendment.⁷ In theory, if a newspaper publishes an embarrassing, but true,⁸ fact about an individual, the paper may be liable for the public disclosure of a private fact, although the media has First Amendment protection to print the information.⁹ But the general case is that many courts provide media with the extraordinarily broad newsworthiness defense,¹⁰ leaving the public disclosure tort effectively impotent.¹¹ As

⁵ RESTATEMENT (SECOND) OF TORTS § 652A (1977).

⁶ Generally, however, the plaintiff bears the burden of proof regarding newsworthiness. *See* *Ross v. Midwest Communications, Inc.*, 870 F.2d 271, 273 (5th Cir.), *cert. denied*, 493 U.S. 935 (1989); *Howard v. Des Moines Register and Tribune Co.*, 283 N.W.2d 289, 300 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980); *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762, 768-70 (Cal. Ct. App. 1983). Therefore, newsworthiness is not, technically, a defense. Nevertheless, courts often refer to the "newsworthiness defense." *See, e.g.*, *Annosen v. Donahue*, 857 S.W.2d 700, 703 (Tex. Ct. App. 1993), *cert. denied*, 114 S. Ct. 2135 (1994).

The effect of placing the burden of proof regarding newsworthiness on the plaintiff is that the plaintiff must prove that the allegedly private information was not newsworthy. In other words, the plaintiff must prove a negative. Therefore, the placement of the burden on the plaintiff puts the plaintiff at a tremendous disadvantage — a much greater disadvantage than would be the case if newsworthiness were truly a defense.

⁷ John P. Elwood, Note, *Outing, Privacy, and The First Amendment*, 102 YALE L.J. 747, 754 (1992) ("A tort based on the publication of truthful information is necessarily bounded by the First Amendment.").

⁸ Note that the public disclosure of private facts tort only applies to true disclosures. If the disclosure is false, then a false light claim is appropriate.

⁹ *Gilbert v. Medical Economics Co.*, 665 F.2d 305, 307 (10th Cir. 1981) ("The first amendment sometimes protects what would otherwise be an actionable invasion of privacy where a publication by the media is involved.").

¹⁰ *See infra* Part III.

¹¹ *See* *Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980): This latter privilege [newsworthiness] is not merely limited to the dissemination of news either in the sense of current events or commentary upon public affairs. Rather, [newsworthiness] extends to information concerning interesting phases of human activity and embraces all

one court explained: "Recognizing the critical position the right to freedom of speech and press occupies in our society, courts are understandably sensitive to any infringement of these rights."¹² Courts have defined "newsworthy" a number of different ways, but the result has generally been the same: newsworthy disclosures of private true facts are privileged.¹³

In Part I, this Note examines the background of the public disclosure tort and its limited treatment by the Supreme Court. Part II presents the various tests for newsworthiness employed by courts, and will attempt to find the test for newsworthiness that strikes the best balance between the First Amendment and the individual's right to be free of unwanted publicity. The final Part argues that the test for newsworthiness advocated by both the Ninth Circuit in *Virgil v. Time, Inc.*,¹⁴ and adopted by the Restatement,¹⁵ strikes the most appropriate balance between the First Amendment and the individual's right to privacy, and as such is the test most likely to be adopted by the Supreme Court if and when it should consider the issue.¹⁶

I. THE PUBLIC DISCLOSURE TORT

No universal understanding exists as to exactly what the right to privacy entails. Since its characterization by Warren and Brandeis as "the right to be left alone,"¹⁷ courts have defined privacy rights in various

issues about which information is needed or appropriate so that individuals may cope with the exigencies of this period.

Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis' Privacy Tort*, 68 CORNELL L. REV. 291, 351 (1983).

¹² *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762, 769 (Cal. Ct. App. 1983).

¹³ *See Jenkins v. Dell Publ'g Co.*, 251 F.2d 447, 450 (3d Cir.) (noting that courts are reluctant to make "factually accurate public disclosures tortious"), *cert. denied*, 357 U.S. 921 (1958).

¹⁴ *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975) (holding that an invasion of privacy cause of action for publication of private facts was properly stated notwithstanding the fact that plaintiff consented and then withdrew consent), *cert. denied*, 425 U.S. 998 (1976).

¹⁵ RESTATEMENT (SECOND) OF TORTS § 652D (1977).

¹⁶ Linda N. Woito & Patrick McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?*, 64 IOWA L. REV. 185, 232 (1979) (arguing for a community decency standard to replace the newsworthiness defense in the disclosure of a private facts tort).

¹⁷ Warren & Brandeis, *supra* note 1, at 193.

ways.¹⁸ The Supreme Court of Kentucky has loosely characterized this concept as the right a private person has to live free from public interference with matters not of public concern.¹⁹ However, the right of privacy is subject to restrictions and is not absolute. Defining where these exact limits lie has resulted in substantial judicial inconsistency, particularly with respect to the newsworthiness defense. As Justice Brennan stated in *Time, Inc. v. Hill*,²⁰ "[e]xposure of the self to others in varying degrees is a concomitant to life in a civilized community."²¹

A proper consideration of the newsworthiness defense requires an understanding of the public disclosure tort. The basic elements of the public disclosure tort vary by jurisdiction.²² However, the Restatement definition is frequently accepted,²³ and is typical of many courts' formulation of the tort. This Note will therefore employ the Restatement's elements of the tort as its working formula. The Restatement (Second) of Torts § 652D states as follows:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public.²⁴

Similarly, several courts follow Professor Prosser's formulation of the tort, which requires the following: (a) a public disclosure, (b) of a private fact, (c) that is highly offensive to a reasonable person, and (d) is not newsworthy.²⁵ Essentially, the Restatement rephrases Prosser.

The disclosed fact must be private. The inherent confusion in the public disclosure tort is evidenced by the inconsistent facts which courts

¹⁸ *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882, 887 (Ky. 1981) (holding that the issue of whether the defendant had placed the plaintiff in a "false" light is a jury question), *cert. denied*, 465 U.S. 975 (1982).

¹⁹ *Id.*; *see, e.g.*, *Yancey v. Hamilton*, 786 S.W.2d 854 (Ky. 1989) (discussing the "false" light cause of action); *Pearce v. Courier-Journal*, 683 S.W.2d 633 (Ky. Ct. App. 1985) (discussing the "false" light cause of action).

²⁰ *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (holding that a magazine article concerning a fictionalization of a true event is protected speech).

²¹ *Id.* at 388.

²² *Zimmerman*, *supra* note 11, at 299.

²³ *Id.*

²⁴ RESTATEMENT (SECOND) OF TORTS § 652D (1977).

²⁵ PROSSER, *supra* note 1, § 117, at 809-12.

have defined as private.²⁶ Generally, a disclosure is deemed to be a private fact if the information was not in the public domain prior to publication. Several courts recognizing the private facts tort have defined a private fact as one not known to the public prior to the defendant's disclosure.²⁷ Therefore, a claimant under the public disclosure tort cannot prevail if the information was already in the public domain.²⁸ Furthermore, the disclosure must be in the form of publicity. Publicity means communication to the general public, or "to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."²⁹ Disclosure to only one person does not qualify as publicity.³⁰

The primary two defenses to the public disclosure tort are consent³¹ and newsworthiness.³² Consent is easily asserted where the plaintiff in the private facts suit had knowledge of the contents of the disclosure and acquiesced to its publication.³³ Newsworthiness, however, is not subject to a similar uniform definition, and has accordingly generated a degree of judicial confusion.³⁴ Essentially, the defense amounts to a showing that the public has a legitimate interest in the disclosed fact,³⁵ and, if established, precludes any recovery under the private facts tort.³⁶ Warren and Brandeis first suggested this defense when they wrote that "[t]he right to privacy does not prohibit any publication of matter which is of public

²⁶ Woito & McNulty, *supra* note 16, at 192.

²⁷ Kilgore v. Younger, 640 P.2d 793, 797 (Cal. 1982) (relying on RESTATEMENT (SECOND) OF TORTS § 652D (1977)); Howard v. Des Moines Register, 283 N.W.2d 289, 298 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980); Harris v. Easton Publ'g Co., 483 A.2d 1377, 1384 (Pa. Super. 1984) (relying on RESTATEMENT (SECOND) OF TORTS § 652D (1977)).

²⁸ Harris, 483 A.2d at 1381.

²⁹ RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977).

³⁰ Harris, 483 A.2d at 1384.

³¹ RESTATEMENT (SECOND) OF TORTS § 652F (consent is an absolute defense to both defamation and invasion of privacy torts).

³² DWIGHT L. TEETER & DON R. LE DUC, LAW OF MASS COMMUNICATIONS: FREEDOM AND CONTROL OF PRINT AND BROADCAST MEDIA § 39, at 269 (7th ed. 1992).

³³ *Id.*

³⁴ *Id.*

³⁵ RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (1977).

³⁶ See, e.g., Jenkins v. Dell Publ'g Co., 251 F.2d 447, 450 (3d Cir.), *cert. denied*, 357 U.S. 921 (1958); Neff v. Time, Inc., 406 F. Supp. 858, 861 (W.D. Pa. 1976).

or general interest."³⁷ The newsworthiness defense incorporates the First Amendment free speech protections by allowing liability only for communications lacking legitimate public interest.³⁸ Courts have gradually increased the scope of the newsworthy defense since its initial formulation in 1890.³⁹ The effect of this expansion has been a steady decrease in the effectiveness of the private facts tort, prompting one commentator to observe that the defense has effectively "swallowed"⁴⁰ the tort.

The courts have formulated several methods of deciding whether a private fact is newsworthy and have applied those methods with varying results. This diversity of approaches to newsworthiness has lead to inconsistent standards of conduct and has created a gray area in which liability may or may not attach to private fact disclosures.⁴¹ A similar lack of uniformity exists regarding whether newsworthiness should be a question of law or a question of fact. While the majority of jurisdictions consider newsworthiness a question of fact to be decided by the jury,⁴² the broad treatment that most courts give the defense allows the defendant to prevail easily on summary judgment motions, and therefore to escape jury scrutiny.⁴³ The ease with which many public disclosure defendants prevail on summary judgment with the newsworthiness defense effectively prevents jury scrutiny of the media, and leads to the subordination of individual privacy interests in favor of First Amendment concerns.⁴⁴ This is not necessarily a bad result, and is consistent with the frequently articulated principle of the "firstness of the First Amendment."⁴⁵ The

³⁷ Warren & Brandeis, *supra* note 1, at 214.

³⁸ Elwood, *supra* note 7, at 754.

³⁹ *Id.* at 755.

⁴⁰ Harry Kalven, Jr., *Privacy in Tort Law — Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 336 (1966) ("What is at issue . . . is whether the claim of privilege is not so overpowering as virtually to swallow the tort.").

⁴¹ See *infra* Part III.

⁴² See, e.g., *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762, 773 (Cal. Ct. App. 1983) (holding that the jury was the proper body to decide newsworthiness).

⁴³ Woito & McNulty, *supra* note 16, at 197.

⁴⁴ *Id.*

⁴⁵ This language began with Edmond Cahn, *The Firstness of the First Amendment*, 65 YALE L.J. 464 (1956) where the author argued that Justice Black's interpretation of the First Amendment is in keeping with Jefferson's and Madison's ideals and therefore "maintain[s] the firstness of the First Amend-

result, however, is that it is extremely difficult for a plaintiff to prevail in a public disclosure claim against the media.⁴⁶

II. THE SUPREME COURT'S LIMITED TREATMENT OF THE PUBLIC DISCLOSURE OF PRIVATE FACTS TORT

The private facts tort, with its implicit censorship of certain speech, naturally conflicts with the First Amendment.⁴⁷ As constitutional arbitrator, the burden of developing a balance between these two concerns falls on the Supreme Court. However, the Supreme Court has not yet considered the outright constitutionality of the public disclosure tort.⁴⁸ As Justice Marshall explained in *Florida Star v. B.J.F.*:⁴⁹

Our decisions in cases involving government attempts to sanction the accurate dissemination of information as invasive of privacy have not . . . exhaustively considered this conflict. . . . [A]lthough our decisions have without exception upheld the press' right to publish, we have emphasized each time that we were resolving this conflict only as it arose in a discrete factual context.⁵⁰

In *Cox Broadcasting Corp. v. Cohn*,⁵¹ the Court considered a public disclosure of private facts claim brought by the father of a deceased rape victim against the owner of a television station that broadcast the victim's name. The Court chose not to consider the general constitutional validity of the public disclosure tort in light of the First Amendment, any discussion of which would have to take into account whether the newsworthiness defense provided sufficient First Amendment protection for the defendant.⁵² This analysis would also have required an express examination of the various tests for newsworthiness. However, the Court did state that the private facts tort represents the greatest current judicial

ment." *Id.* at 481.

⁴⁶ Woito & McNulty, *supra* note 16, at 197.

⁴⁷ Mark Schadrack, Note, *Privacy and the Press: a Necessary Tension*, 18 LOY. L.A. L. REV. 949, 951 (1985).

⁴⁸ See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 490 (1975).

⁴⁹ *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

⁵⁰ *Id.* at 530.

⁵¹ *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

⁵² *Id.* at 491 ("Rather than address the broader question of whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments . . .").

conflict with the First Amendment.⁵³ Instead of broadly considering the constitutionality of the tort, the *Cox Broadcasting* Court narrowly confined its ruling to the question of whether information obtained from public records can ever create liability for the public disclosure of a private fact.⁵⁴ The Court held that liability cannot result from disclosure of private facts already in public records.⁵⁵ Therefore, the television station was not liable for disclosing the rape victim's name since it was obtained from public court records.⁵⁶

The Court impliedly rejected consideration of the newsworthiness defense in this situation when it declined to consider whether the facts disclosed from a public record were offensive.⁵⁷ In this determination, the Court indicated that it was incorporating First Amendment considerations.⁵⁸ By declining to consider the character of the disclosed information, the Court carved out an exception to the public disclosure tort in which no liability may attach — the disclosure of private facts contained in a public record.⁵⁹ In its refusal to broadly consider the constitutionality of the public disclosure tort, the Court placed a heavy burden with the states when it noted that they should protect privacy interests by avoiding the release of private facts in court documents.⁶⁰

Despite the Court's refusal in *Cox Broadcasting* to expressly consider the private facts tort, the Court impliedly concedes that the press may be liable, in certain instances, for disclosures of private facts when it held that no liability may attach to disclosures of private facts found in supposedly protected public records.⁶¹ The negative implication of this holding is that liability might attach to disclosures not arising from public documents. For this reason, the *Cox Broadcasting* decision can be seen

⁵³ *Id.* at 489.

⁵⁴ *Id.* at 491.

⁵⁵ *Id.* at 496-97.

⁵⁶ *Id.*

⁵⁷ *Id.* at 494-96. Consideration of the level of offensiveness of a private fact derived from public records "would make it very difficult for the media to inform citizens about the public business and yet stay within the law." *Id.* at 496.

⁵⁸ *Id.* ("[T]he First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records.").

⁵⁹ Schadrack, *supra* note 47, at 959 (characterizing public record rule as the "'matter of public concern' exception.").

⁶⁰ *Cox Broad.*, 420 U.S. at 496.

⁶¹ *Id.*

as a pyrrhic victory for freedom of the press advocates, instead of the broad mandate for media freedom it may appear to be at first glance.

Fifteen years after the *Cox Broadcasting* decision, the Supreme Court again had occasion to consider the public disclosure of private facts in the case of *Florida Star v. B.J.F.*⁶² Significantly, *Florida Star* implies that the *Cox Broadcasting* decision may have rested on unstated newsworthiness considerations, by indicating through its holding that the public record exception may be fact specific and dependent on the degree of public interest that the disclosure serves.⁶³ The situation in *Florida Star* was remarkably similar to that in *Cox Broadcasting*. A newspaper had published the name of a rape victim. The victim sought to hold the paper liable under a Florida statute prohibiting the media from publishing the name of a rape victim. Unlike *Cox Broadcasting*, the victim's name was not included in a public court record, but was mistakenly included in a publicly-released police report.⁶⁴ The *Florida Star* Court again limited its holding to the narrow issue of whether the media could be liable for the public disclosure of information lawfully obtained from a record in the public domain.⁶⁵ In so holding, the Court declined to consider the general constitutionality of the private facts tort and the limits, if any, of the newsworthiness defense:

Nor need we accept appellant's invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.⁶⁶

In *Florida Star*, the Court acknowledged that "one of the reasons we gave in *Cox Broadcasting* for invalidating the challenged damages award was the important role the press plays in subjecting trials to public

⁶² *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (holding that First Amendment considerations preclude imposing liability on a newspaper for publishing a rape victim's name lawfully obtained from a police report).

⁶³ *Id.* at 541 ("We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest. . .").

⁶⁴ *Id.* at 528.

⁶⁵ *Id.* at 533.

⁶⁶ *Id.* at 532-33.

scrutiny and thereby helping guarantee their fairness."⁶⁷ It is hardly debatable that ensuring the fairness of judicial proceedings is a compelling public interest. If, however, the Court would be less likely to apply the public record exception in a situation where public interest was not as paramount, as *Florida Star* indicates, then it effectively has adopted a newsworthiness test in which certain disclosures from public records are accorded greater privilege than are others.

The final aspect of the Supreme Court's narrow consideration of the private facts tort is seen in its brief statement in *Time, Inc. v. Hill*,⁶⁸ acknowledging the existence of the newsworthiness defense in private facts suits.⁶⁹ However, the *Time, Inc.* Court declined to consider the constitutionality of a private facts claim, and also provided no guidance as to which formulation of newsworthiness it would apply if faced with the issue. In *Time, Inc.*, the Supreme Court analyzed a false light invasion of privacy claim⁷⁰ and acknowledged that if the challenged disclosures are true (as in the case of the private facts tort), then a finding of newsworthiness is an absolute defense.⁷¹ The Court recognized a decency limitation to the newsworthy defense,⁷² meaning that even disclosures of private facts that are of legitimate public concern may be so offensive that they shock the community's notions of decency and therefore do not bar liability.⁷³ Aside from this short observation, the Supreme Court has consistently refused to broadly consider the public disclosure tort, and has not indicated which, if any, of the various tests for newsworthiness strikes the requisite balance between the individual's right to privacy and the First Amendment. Indeed, at least one commentator has predicted that the private facts tort will not withstand constitution-

⁶⁷ *Id.* at 532.

⁶⁸ *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

⁶⁹ *Id.* at 381.

⁷⁰ In a false light invasion of privacy claim, the publicly disclosed information portrays the plaintiff in a misleading manner. *TEETER & LE DUC*, *supra* note 32, at 290.

⁷¹ *Time, Inc.*, 385 U.S. at 384.

⁷² *Id.* at 384 n.7. In response to the lower court's interpretation of a New York statute the court stated: "[t]his limitation to newsworthy persons and events does not . . . foreclose an interpretation . . . to allow damages where the relations may be so intimate and unwarranted in view of the victim's position as to outrage the community's notions of decency." *Id.* (quoting with approval *Sidis v. F-R Publ'g Corp.*, 113 F.2d 806, 809 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940)).

⁷³ *Id.* at 383.

al scrutiny when the Supreme Court finally considers it in a broad context, due to the First Amendment's mandated protection of true speech.⁷⁴ However, if the public disclosure tort does pass constitutional muster, the Court must adopt a standard for newsworthiness. Several of the more prominent approaches to defining exactly what is newsworthy are discussed below

III. THE CONCEPT OF NEWSWORTHINESS

As noted earlier, assuming the Constitutionality of the private facts tort, the conclusion that certain private information is of such overriding public concern that its publication should be privileged has spawned a variety of methods to determine whether the disclosed information is in fact newsworthy. First Amendment concerns are at the forefront of any discussion of the newsworthy defense. Since a finding of newsworthiness permits the publication of truthful private information, it assures that the privacy tort does not abridge the Constitution. The citizenry has a necessary stake in the maintenance of a free press: "[Constitutional free press] guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society."⁷⁵ So long as the public disclosure tort is recognized, the newsworthy defense helps to preserve freedom of the press, and therefore assumes constitutional importance.

All information is arguably of public concern.⁷⁶ However, most jurisdictions recognizing the private facts tort have chosen to draw the line separating privileged disclosures from invasions of privacy somewhere between absolute freedom of the press and complete censorship. The following tests for newsworthiness fall somewhere on this continuum.

⁷⁴ Zimmerman, *supra* note 11, at 365.

⁷⁵ *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1975); *see also* *New York Times Co. v. Sullivan*, 376 U.S. 254, 254 (1964). "The general proposition that freedom of expression is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

⁷⁶ Zimmerman, *supra* note 11, at 351.

A. *Complete Rejection of Invasion of Privacy Claims for Publication of Private True Facts*

At the extreme end of this spectrum are those few jurisdictions that do not recognize the public disclosure of private facts tort.⁷⁷ However, lack of judicial recognition and outright rejection are two different things, and only five jurisdictions have rejected the tort outright.⁷⁸ Such a determination sacrifices the individual's right to privacy in return for an assurance of First Amendment protections. By holding that all true speech is privileged, these jurisdictions impliedly hold that all media communications are newsworthy and provide true disclosures with greater First Amendment protection than the United States Supreme Court has required to date.⁷⁹ The recent decision by the North Carolina Supreme Court in *Hall v. Post*⁸⁰ is illustrative of this paradigm.

In *Hall*, North Carolina rejected the public disclosure tort as being "constitutionally suspect,"⁸¹ stating that it would add to the tension between tort law and the First Amendment, and that private fact claims are more appropriately dealt with by an intentional infliction of emotional distress suit.⁸² The *Hall* court relied on the reasoning of the United States Supreme Court in *Cox Broadcasting*, in which the Court stated that the private facts tort represents the greatest current judicial conflict with the First Amendment.⁸³

The rationale for according an absolute privilege to truthful disclosures places a premium on protecting freedom of the press,⁸⁴ and provides the judicial certainty lacking in the jurisdictions that employ

⁷⁷ Moretti, *supra* note 4, at 903 ("The following states do not recognize a cause of action for the publication of private facts: Minnesota, Nebraska, New York, North Carolina, North Dakota, and Virginia.").

⁷⁸ *Id.* at 901-03 (Nebraska, New York, Utah, Rhode Island, and North Carolina).

⁷⁹ Lucy Noble Inman, *Hall v. Post: North Carolina Rejects Claim of Invasion of Privacy by Truthful Publication of Embarrassing Facts*, 67 N.C. L. REV. 1474, 1474 (1989).

⁸⁰ *Hall v. Post*, 372 S.E.2d 711 (N.C. 1988).

⁸¹ *Id.* at 717.

⁸² *Id.* *Hall* remains binding authority in North Carolina, and to date, North Carolina has not yielded to the trend in many other states toward recognition of the public disclosure tort.

⁸³ *Id.* at 716 (relying on *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 489 (1975)).

⁸⁴ Inman, *supra* note 79, at 1489.

abstract legal tests to determine newsworthiness. Under this approach, truthful speech is privileged and no newsworthiness determination is required.⁸⁵ The chilling effect on the media resulting from uncertain liability is avoided, and the individual, not the courts, is expected to protect his own privacy by keeping personal information out of the media's reach. Consequently, any erosion of the First Amendment inherent in recognition of the private facts tort is avoided. Under this approach, however, the downside is that there is no recourse for publication of offensive true speech.

B. The "Leave It to the Press Model"

Another approach has been characterized by Diane Zimmerman as the "leave it to the press" model in her famous law review article.⁸⁶ The "leave it to the press" approach functions exactly as it sounds, in that it essentially lets the media decide whether private information is newsworthy.⁸⁷ The result is to hold that "what is printed is by definition of legitimate public interest,"⁸⁸ and hence newsworthy. The theoretical difference between this approach and the *Hall* approach is that the "leave it to the press" model recognizes the private facts tort while the *Hall* approach does not. However, in practice there is little difference because the "leave it to the press" approach accords the newsworthy defense such a broad scope that it essentially leaves the tort ineffective. Zimmerman argues that judicial deference to editorial judgment is not as random as it sounds because market controls function to limit unchecked media discretion.⁸⁹ Consumer repulsion will put rabid yellow journalists out of business without the cost to the taxpayers of judicial enforcement.⁹⁰

⁸⁵ *Id.*

⁸⁶ Zimmerman, *supra* note 11, at 353. Diane Zimmerman is a Professor of Law at New York University and penned the famous article *Requiem for a Heavyweight: Farewell to Warren and Brandeis's Privacy Tort*, *supra* note 11, in which the "leave it to the press" model was first described. A number of jurisdictions have adopted the "leave it to the press" approach. *See, e.g.*, *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957, 960 (D. Minn. 1948); *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289, 302 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980).

⁸⁷ Zimmerman, *supra* note 11, at 353.

⁸⁸ *Id.*

⁸⁹ *Id.* at 354.

⁹⁰ *Id.* at 292.

The Third Circuit's decision in *Jenkins v. Dell Publishing Co.*⁹¹ illustrates the workings of the "leave it to the press" model. The *Jenkins* court refused to distinguish between news as information and news as entertainment.⁹² Arguably, since all publications can fall within either news or entertainment, the court reasoned that everything published is "news." Since the public always has a legitimate interest in news, it follows that the mere act of publishing possibly lurid private information renders it newsworthy. Indeed, the *Jenkins* court felt that this was a fair price to pay in order to avoid judicial censorship.⁹³

The "leave it to the press" approach is inherently flawed in its assumption that the consumer market will operate to censor disclosures that would not be deemed newsworthy under other standards. One only has to turn on current daytime television or pick up a tabloid to realize that intrusive and offensive journalism is alive and well. Under the *Jenkins* analysis, "trash TV"⁹⁴ is legitimized simply by virtue of being broadcast. This standard is a classic example of what is meant by commentators who observe that the breadth accorded the newsworthy defense can render the private facts tort meaningless.⁹⁵

C. *The Virgil v. Time, Inc.*⁹⁶ and Restatement Approach

The test for newsworthiness developed by the Restatement⁹⁷ and first articulated by the Ninth Circuit in *Virgil v. Time, Inc.*,⁹⁸ is the most

⁹¹ *Jenkins v. Dell Publ'g Co.*, 251 F.2d 447 (3d Cir.) (holding that there is no need to determine whether publication is for entertainment or information in order to render it newsworthy), *cert. denied*, 357 U.S. 921 (1958); *see also* *McNutt v. New Mexico State Tribune Co.*, 538 P.2d 804 (N.M. Ct. App.) (holding that it is unnecessary to distinguish between entertainment and information), *cert. denied*, 540 P.2d 248 (N.M. 1975).

⁹² *Jenkins*, 251 F.2d at 451.

⁹³ *Id.* at 452 ("Any other rule would dangerously and undesirably obstruct the publication of patently newsworthy items by compelling the publisher to speculate as to the value judgments of a judge or jury . . .").

⁹⁴ An example of "trash TV" is: *Tempest: Women Confront the Men Who Got Them Pregnant but Abandoned Their Children* (NBC television broadcast, Oct. 30, 1995). Others include: *Ricki Lake*, *Montel Williams*, *Jenny Jones*, and *Carnie Wilson*.

⁹⁵ *See, e.g.*, Kalven, *supra* note 40, at 336.

⁹⁶ *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 428 U.S. 998 (1976).

⁹⁷ RESTATEMENT (SECOND) OF TORTS § 652D (1977).

⁹⁸ *Virgil*, 527 F.2d at 1129.

complex and widely accepted test for newsworthiness.⁹⁹ The *Virgil* court held that newsworthiness is assessed as follows:

In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a *morbid and sensational* prying into private lives for its own sake, with which a reasonable member of the public, *with decent standards*, would say that he had no concern.¹⁰⁰

Therefore, matters of "legitimate public concern" are newsworthy.¹⁰¹ This is a fact question for the jury,¹⁰² and is to be assessed based on the locality's community mores.¹⁰³ This approach allows the jury to hold defendants liable for disclosures it finds newsworthy if the disclosure violates the decency limitation.¹⁰⁴ The eponymous decency limitation on newsworthy disclosures provides that liability may still attach to newsworthy publications that are "so intimate and unwarranted in view of the victim's position as to outrage the community's [jury's] notions of decency."¹⁰⁵ A private fact may be of "legitimate public concern," but still be so indecent that its publication constitutes an invasion of privacy.

The *Virgil* standard does not, however, give free rein to the jury. Despite the directive that newsworthiness and the decency limitation be issues of fact, strict judicial scrutiny of the evidence is required to determine whether the defendant should prevail as a matter of law.¹⁰⁶ The possible chilling effect that private fact actions may have on the First Amendment mandates that the judge treat such cases with "special care."¹⁰⁷ The result of a community mores test combined with judicial

⁹⁹ Ronald F. Wick, Note, *Out of the Closet and Into the Headlines: Outing and the Private Facts Tort*, 80 GEO. L.J. 413, 425 (1991).

¹⁰⁰ *Virgil*, 527 F.2d at 1129 (quoting RESTATEMENT (SECOND) OF TORTS § 652F (Tentative Draft No. 13 (1967))) (emphasis added).

¹⁰¹ *Id.*

¹⁰² *Id.* at 1130.

¹⁰³ RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (1977).

¹⁰⁴ *Virgil*, 527 F.2d at 1130.

¹⁰⁵ *Sidis v. F-R Publ'g Corp.*, 113 F.2d 806, 809 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940).

¹⁰⁶ *Woito & McNulty*, *supra* note 16, at 220.

¹⁰⁷ *Virgil*, 527 F.2d at 1130. "Chilling effect" is a common term used by

scrutiny is a standard, according to the *Virgil* court, that is respective of individual's privacy interests without offending the First Amendment.¹⁰⁸

D. *The Nexus Test*

Yet another standard for determining newsworthiness has been developed by the Fifth¹⁰⁹ and Tenth¹¹⁰ Circuits. In *Campbell v. Seabury Press*,¹¹¹ the claimant, a third party mentioned in a biography written by the defendant, sued over embarrassing private facts concerning her marital life disclosed in the book. The Fifth Circuit acknowledged the newsworthy defense by recognizing the existence of a First Amendment constitutional privilege to disclose information of public interest.¹¹² *Campbell* then incorporated the previously discussed decency limitation.¹¹³ Additionally, *Campbell* further limited the newsworthiness privilege by adding its "nexus requirement," which demands that "a logical nexus [or relationship] exist between the complaining individual and the matter of legitimate public interest."¹¹⁴ The court concluded that this extra requirement provides sufficient protection for individual privacy interests.¹¹⁵

commentators to describe the detrimental effect on free speech in popular media that would result from limiting the defense of newsworthiness or expanding the private fact disclosure tort.

¹⁰⁸ *Id.*

¹⁰⁹ *Campbell v. Seabury Press*, 614 F.2d 395 (5th Cir. 1980); *Ross v. Midwest Communications, Inc.*, 870 F.2d 271 (5th Cir.), *cert. denied*, 493 U.S. 935 (1989).

¹¹⁰ *Gilbert v. Medical Economics Co.*, 665 F.2d 305 (10th Cir. 1981).

¹¹¹ *Campbell*, 614 F.2d at 395.

¹¹² *Id.* at 397.

¹¹³ *Id.*

¹¹⁴ *Id.* See also Kimberly Wood Bacon, Comment, *Florida Sun v. B.J.F.* [sic — the case is named *Florida Star v. B.J.F.*]: *The Right of Privacy Collides With the First Amendment*, 76 IOWA L. REV. 139, 165 (1990) (discussing the failure of the Supreme Court to protect an individual's right against public disclosure of private facts).

Apparently, the Fifth Circuit has also refused to distinguish between news and entertainment. In *Campbell*, the court discussed the media's privilege to publish information which concerns "interesting phases of human activity." *Campbell*, 614 F.2d at 397.

¹¹⁵ *Campbell*, 614 F.2d at 397.

Campbell's reasoning was subsequently adopted by the Tenth Circuit in *Gilbert v. Medical Economics Co.*,¹¹⁶ with substantially the same effect as in *Campbell*. However, the *Gilbert* court defined "nexus" as a "substantial relevance,"¹¹⁷ rather than a "logical relationship."

E. The California Approach

The Supreme Court of California has developed yet another test for newsworthiness, as expressed in *Briscoe v. Reader's Digest Ass'n*.¹¹⁸ The court held that newsworthiness is a function of the following factors: (a) the social value of the information, (b) the extent of the intrusion into private areas, and (c) the extent to which the complaining party has voluntarily placed himself/herself in the public eye.¹¹⁹ A disclosure deemed newsworthy by the above analysis may still be subject to judicial censorship under the decency limitation.¹²⁰ However, the decency limitation is given a slightly different interpretation by the California courts than in the Ninth Circuit.¹²¹ In order for the newsworthy disclosure to be deemed indecent, the plaintiff must prove that the defendant published the information with "reckless disregard."¹²² The *Briscoe* court felt that this additional restriction on the decency limitation would prevent any resulting "chill" on First Amendment freedoms.¹²³ Additionally, the California approach allows the First Amendment to prevail in the case of an even balance between a newsworthy disclosure and the decency limitation.¹²⁴

F. General Problems with the Practical Extent of the Newsworthiness Defense

The extreme practical scope which most courts give the newsworthy defense greatly exceeds its theoretical scope.¹²⁵ While in theory news-

¹¹⁶ *Gilbert v. Medical Economics Co.*, 665 F.2d 305, 308 (10th Cir. 1981).

¹¹⁷ *Id.*

¹¹⁸ *Briscoe v. Readers' Digest Ass'n*, 483 P.2d 34 (Cal. 1971).

¹¹⁹ *Id.* at 43.

¹²⁰ *Id.* at 42-43.

¹²¹ For a discussion of the Ninth Circuit's approach, see *supra* notes 96-108 and accompanying text.

¹²² *Briscoe*, 483 P.2d at 44.

¹²³ *Id.* at 43.

¹²⁴ *Id.*

¹²⁵ Kalven, *supra* note 40, at 336.

worthiness is seen as a judicial check on the overreaching private facts tort necessary to protect the First Amendment, in reality the situation is quite different. Courts have been historically reluctant to limit the practical scope of the newsworthy doctrine for fear of censoring free speech and violating the First Amendment.¹²⁶ The result of this judicial reluctance to limit the scope of the newsworthiness defense has allowed most defendants in private fact claims to prevail easily on summary judgment.¹²⁷ Even the *Virgil* test, with its theoretical emphasis on jury consideration and the application of community mores via the decency limitation, has led to a rather small number of successful private fact claims.¹²⁸ This apparent ineffectiveness has led scholars to advocate putting the private facts tort to rest,¹²⁹ as North Carolina did in *Hall v. Post*,¹³⁰ or to simply adopt a broader test like the "leave it to the press" approach.¹³¹

IV. THE *VIRGIL* TEST BALANCES INDIVIDUAL PRIVACY RIGHTS AND THE FIRST AMENDMENT

The *Virgil*¹³² test protects the First Amendment by adopting a community mores approach in defining newsworthiness. The community

¹²⁶ *Woitto & McNulty*, *supra* note 16, at 222; *see, e.g.*, *Haynes v. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993); *Ross v. Midwest Communications, Inc.*, 870 F.2d 271 (5th Cir.), *cert. denied*, 493 U.S. 935 (1989); *Gilbert v. Medical Economics Co.*, 665 F.2d 305 (10th Cir. 1981); *Campbell v. Seabury Press*, 614 F.2d 395 (5th Cir. 1980); *Ramos v. Front Page Detective Magazine, No. CIV. A. No. 85-6932* 1986 WL 11058 (E.D. Penn. Oct. 3, 1986); *Pasadena Star-News v. Superior Ct.*, 203 Cal. App. 3d 131 (Cal. Ct. App. 1988); *McNutt v. New Mexico State Tribune Co.*, 538 P.2d 804 (N.M. Ct. App.), *cert. denied*, 540 P.2d 248 (N.M. 1975); *Freihoffer v. Hearst Corp.*, 480 N.E.2d 349 (N.Y. 1985); *Anderson v. Fisher Broad. Co., Inc.*, 712 P.2d 803 (Or. 1986); *Anonsen v. Donahue*, 857 S.W.2d 700 (Tex. Ct. App. 1993), *cert. denied*, 114 S. Ct. 2135 (1994).

¹²⁷ *Woitto & McNulty*, *supra* note 16, at 197.

¹²⁸ *Zimmerman*, *supra* note 11, at 359. It is the author's belief that such results are, in all probability, due to an unstated judicial fear of abridging the First Amendment.

¹²⁹ *Id.* at 365.

¹³⁰ *Hall v. Post*, 372 S.E.2d 711, 717 (N.C. 1988).

¹³¹ *Zimmerman*, *supra* note 11, at 353.

¹³² *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976).

mores standard is broad enough that it does not define "news" rigidly.¹³³ However, the decency limitation, also dependent on community mores, is not so vague that it will cause a "chilling effect" on the media.¹³⁴ Additionally, the close judicial scrutiny mandated by the *Virgil* court defeats the rationale for the *Hall*¹³⁵ and "leave it to the press" approaches because it assures that the jury will not ride roughshod over constitutional free speech guarantees.¹³⁶ The *Virgil* court's ruling amounts to independent judicial factual review, and functions as a constitutional safeguard.¹³⁷

While the *Virgil* test assures adequate consideration of free speech concerns, it does not sacrifice the individual's interest in maintaining his own privacy. Private fact suits are not discouraged because, unlike the California¹³⁸ and the "nexus"¹³⁹ approaches, the claimant does not have the difficult burden of proving reckless disregard on the part of the press. Furthermore, the *Virgil* approach does not leave the tort without limits. The jury's community mores decency test functions to rein in the expansive newsworthiness defense.¹⁴⁰ Without the community mores test the individual has only a theoretical recourse when embarrassing private facts about him are disclosed in the media. Finally, a community mores standard is sufficiently flexible to accommodate changing notions about privacy.¹⁴¹

Assuming that the Supreme Court finds the tort constitutionally valid,¹⁴² it would then have to adopt a standard under which the press

¹³³ For a complete discussion of this approach, see *supra* notes 96-108 and accompanying text.

¹³⁴ Woito & McNulty, *supra* note 16, at 227 ("When measured by common understandings and practices, and when combined with the skill of the media in ascertaining 'news,' morbid and sensational prying for its own sake clearly conveys a sufficiently definite warning to avoid a chilling effect on the dissemination of protected speech.").

¹³⁵ *Hall v. Post*, 372 S.E.2d 711 (N.C. 1988).

¹³⁶ *Virgil*, 527 F.2d at 1129.

¹³⁷ Woito & McNulty, *supra* note 16, at 230.

¹³⁸ For discussion of California's test, see *supra* notes 118-24 and accompanying text.

¹³⁹ For discussion, see *supra* notes 109-17 and accompanying text.

¹⁴⁰ Woito & McNulty, *supra* note 16, at 228.

¹⁴¹ Wick, *supra* note 99, at 425.

¹⁴² The Supreme Court has never considered the general constitutional validity of the public disclosure of private facts tort, avoiding this issue with narrow holdings in *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) and *Florida*

would have the privilege of a newsworthy defense. The similarity of the *Virgil* test and the Court's test for obscenity developed in *Miller v. California*,¹⁴³ indicates that the Supreme Court will adopt the *Virgil* and Restatement approach.

Since the First Amendment is implicated any time speech is restricted, an analogy may be drawn between the public disclosure tort and obscenity issues. In *Miller*, the Court applied a reasonable person/community mores test to determine obscenity.¹⁴⁴ The similarity between the *Miller* test for obscenity and the *Virgil* test for newsworthiness is seen in the *Miller* provisions:

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards," would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹⁴⁵

Miller affirmed the proposition, established in *Roth v. United States*,¹⁴⁶ that obscenity is not a constitutionally protected form of free speech.¹⁴⁷ Additionally, *Miller* attempted to resolve the problem of differing geographic perceptions of what is obscene.¹⁴⁸ The *Miller* Court was firmly committed to a reliance on the jury system, applying contemporary community mores,¹⁴⁹ despite the possible abridgments of First Amendment protections.¹⁵⁰ The *Miller* Court noted that the possibility of inconsistent jury verdicts regarding similar material "does not mean that constitutional rights are abridged."¹⁵¹ In acknowledging that notions of obscenity will vary regionally, the *Miller* Court recognized

Star v. B.J.F., 491 U.S. 524 (1989). The Court may not find the tort constitutional if First Amendment free speech concerns are found to be paramount, as previously discussed. See, e.g., Zimmerman, *supra* note 11, at 305.

¹⁴³ *Miller v. California*, 413 U.S. 15 (1973).

¹⁴⁴ *Id.* at 24.

¹⁴⁵ *Id.* (citations omitted).

¹⁴⁶ *Roth v. United States*, 354 U.S. 476 (1957).

¹⁴⁷ *Miller*, 413 U.S. at 20.

¹⁴⁸ *Id.* at 25.

¹⁴⁹ *Id.* at 26.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 26 n.9.

that uniform national obscenity standards would be patently inadequate to accommodate the fundamental differences in how sexual material is perceived in Kentucky versus Times Square.¹⁵² The *Virgil* and Restatement test for newsworthiness rests on similar reasoning. Indeed, the *Virgil* court expressly cites *Miller* as its rationale for a community mores test: "The fact that the standard [newsworthiness in *Virgil*] is made to depend on community mores does not, to us, make it constitutionally infirm. Community standards play a role of constitutional dimension in other areas of free speech — e.g., as to the obscene nature of a publication."¹⁵³

Since the *Miller* Court firmly believed that local community mores, applied by a jury, provide sufficient First Amendment protection for persons accused of obscenity violations, it is natural to assume that the Court will decide that the *Virgil* community mores newsworthiness standard is constitutionally adequate. Furthermore, the *Miller* obscenity test and the *Virgil* newsworthiness standard both incorporate a decency limitation on privileged speech.¹⁵⁴ This is seen in *Miller*'s "patently offensive sexual conduct" provision, and in *Virgil*'s "morbid and sensational prying for its own sake."¹⁵⁵ The similarity, discussed above, behind the reasoning of the *Miller* obscenity test and the *Virgil* approach to deciding newsworthiness provides a strong argument that the Court will adopt the *Virgil* standard if and when it decides to broadly consider the private facts tort.¹⁵⁶

CONCLUSION

The approach to newsworthiness taken by the *Virgil*¹⁵⁷ court and the Restatement¹⁵⁸ is still the best balance between individual privacy rights and First Amendment free speech guarantees. Therefore, it should be the standard adopted by the Supreme Court if the Court finds that the private facts tort passes constitutional muster. The community mores standard and the decency limitation allow the citizenry to act as the

¹⁵² TEETER & LE DUC, *supra* note 32, at 349.

¹⁵³ *Virgil v. Time, Inc.*, 527 F.2d 1122, 1129 n.12 (9th Cir. 1975) (quoting *Miller v. Cal.*, 413 U.S. 15, 24 (1973)), *cert. denied*, 428 U.S. 998 (1976).

¹⁵⁴ *Woitto & McNulty*, *supra* note 16, at 226.

¹⁵⁵ *Id.* (summarizing each court's test).

¹⁵⁶ *Kalven*, *supra* note 40, at 336 n.57.

¹⁵⁷ *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976).

¹⁵⁸ RESTATEMENT (SECOND) OF TORTS § 652D (1977).

media's ultimate editor, while the court's concurrent factual scrutiny prevents the community's censorship impulses from running wild over the press's First Amendment protections. This combination achieves a fair balance between the divergent interests inherent in any public disclosure of private fact action.

Furthermore, as considered above, the similarity between the *Virgil* and Restatement community mores or decency standard for newsworthiness and the Supreme Court's test for obscenity as articulated in *Miller v. California* indicates that the *Virgil* approach will survive First Amendment scrutiny. The *Miller* test for obscenity has survived twenty years of constitutional consideration, and has become a fixture in the Supreme Court's First Amendment framework. It follows that the constitutional similarity between the *Virgil* newsworthiness standard and the *Miller* obscenity test leaves a high probability that this standard for newsworthiness will be the approach taken by our high court if and when it chooses to broadly consider the constitutionality of the public disclosure of private facts tort and its attendant newsworthy defense.